

1 continuous breach of the billing agreements, plaintiffs will prevail on their breach of contract
2 claims and are entitled to an injunction to stop that breach. *See MAI Systems*, 1992 WL 159803
3 at *18 (upholding preliminary injunction to prevent defendant from breaching his contractual
4 duty not to disclose or use plaintiff's trade secrets and confidential information); *Liberty Mutual*
5 *Ins. Co. v. Gallagher Co.*, 1994 WL 715613, *5 (N.D. Cal. 1994).

6 **2. Pacific Has Misappropriated Plaintiffs' Proprietary**
7 **Trade Secret Information**

8 Plaintiffs will also prevail on their claim for misappropriation of trade secrets. To
9 prove their claim, plaintiffs must show: (1) the existence of a trade secret; (2) disclosure or use
10 of that secret without plaintiffs' consent; and (3) an obligation not to disclose or use the trade
11 secret. *See* Cal. Civ. Code § 3426.1(b); *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 250
12 (1968). Each of those elements is met here. "Actual or threatened misappropriation may be
13 enjoined." Cal. Civ. Code § 3426.2.

14 **a) The Trade Secrets**

15 As to the first element, the existence of the trade secret, a trade secret is
16 "information, including a formula, pattern, compilation, program, device, method, technique, or
17 process, that: (1) derives independent economic value, actual or potential, from not being
18 generally known to the public or to other persons who can obtain economic value from its
19 disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to
20 maintain its secrecy." Cal. Civ. Code § 3426.1(d).

21 Plaintiffs' compiled proprietary information, in which plaintiffs have invested
22 substantial resources (see Section II.B.), is trade secret information. Plaintiffs' proprietary
23 information is not generally known to others and has economic value to plaintiffs in remaining
24 secret. Section II.D. Plaintiffs have taken all reasonable steps to maintain the secrecy of their
25 proprietary information. Plaintiffs have always kept their proprietary information confidential
26 and divulged it only to those employees for whom it was necessary to carry out their jobs.

1 Section II.C. The very purpose of each Billing Agreement's restriction on use and "Proprietary
2 Information" section is to maintain its confidentiality. That restriction was an important and
3 necessary safeguard for each plaintiff; without it, no plaintiff would have allowed Pacific access
4 to its information. Section II.C.

5 Plainly, plaintiffs' trade secret information is also valuable to Pacific: (1) it
6 allows Pacific to conduct its customer loyalty program, and (2) it permits PB Com to direct its
7 sales efforts at plaintiffs' most profitable customers. Sections II.B & D. *See American Credit*
8 *Indemnity*, 213 Cal. App. 3d at 631; *see also ABBA Rubber Co. v. Seaquist*, 235 Cal. App. 3d 1,
9 20-21 (1991); *Courtesy Temp. Service, Inc. v. Comacho*, 222 Cal. App. 3d 1278 (1990). The
10 competitive advantage Pacific has obtained is the core of a trade secret's value. *See Religious*
11 *Tech. Center v. Wollersheim*, 796 F.2d 1076, 1090 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103
12 (1987).

13 Without the Billing Agreements, Pacific would not have plaintiffs' valuable
14 proprietary information, including the total long distance charges. One need only look to
15 Pacific's awards program itself to see the value to Pacific of plaintiffs' information. Pacific says
16 it cannot conduct its customer loyalty program -- a powerful marketing tool that "locks in"
17 customers and creates disincentives for customers to switch carriers -- *without* plaintiffs'
18 proprietary billing information.⁹ Section II.B. By allowing Pacific to "win over" customers
19 now, the program creates an immediate competitive advantage.

20 In addition, plaintiffs' proprietary compilation is extremely valuable competitive
21 information. As explained above (see Section II.D.), by taking it, Pacific saves vast amounts of

22

23 ⁹ While Pacific is free to award customers bonus points on their long distance charges if it
24 obtains that information legally, misappropriating plaintiffs' information saves Pacific expense
25 and effort, and provides Pacific with perfectly accurate and complete information. It also makes
26 the program more viable, since customers are unlikely to be willing to expend much energy
themselves.

1 money trying to find out who the heavy users of long distance are, and instead gets a list of
2 plaintiffs' best customers.¹⁰

3 **b) Disclosure Or Use**

4 The second element of misappropriation, disclosure or use, is established by
5 Pacific's admission that it is already using plaintiffs' proprietary information to calculate points
6 for the awards program. Section II.C. Even if Pacific Bell is doing the calculations itself, and
7 then disclosing the information to PB Extras, plaintiffs' trade secrets are being used in violation
8 of the Billing Agreements. Pacific also admits that Pacific Bell intends to transfer plaintiffs'
9 information, as a component of the "lump sum," to other companies within the Pacific family,
10 including PB Com. Section II.C.

11 **c) Duty Not To Disclose**

12 The Billing Agreements clearly prohibit Pacific Bell from using any plaintiff's
13 proprietary billing information for purposes other than billing. Section II.C. Pacific, therefore,
14 has an obligation not to disclose or use plaintiffs' proprietary information for its own marketing
15 purposes, and Pacific clearly knows that its knowledge of the trade secret information was
16 acquired under circumstances giving rise to a duty to maintain secrecy. Cal. Civ. Code
17 § 3426.1(b)(2)(B)(ii); *see, e.g., Ojala v. Bohlin*, 178 Cal. App. 2d 292, 298 (1960) (having
18 received plaintiff's trade secret in confidence for one purpose, defendant could not use it for
19 another).

21
22 ¹⁰ In addition to a list of long distance customers, plaintiffs' compiled proprietary customer
23 billing databases contain information on the amount of money those customers spend on long
24 distance bills each month, where and who they call, at what times, what other services they use,
25 and their pricing and discount structures. 5/7 Banco Dec., ¶¶ 7, 8; Arnett Dec., ¶¶ 7, 8; 5/7
26 Morrison Dec., ¶ 7-8. This information is not generally known to others in the industry,
particularly not in the level of detail provided in the proprietary databases. 5/7 Banco Dec., ¶¶ 9-
10; Arnett Dec., ¶¶ 9-10.

1 Pacific is not free to disregard the contracts for its own competitive advantage.
2 This misappropriation must be enjoined. Cal. Civ. Code § 3426.2; *see MAI Systems*, 1992 WL
3 159803, *14-18; *U.S. Surgical Corp.*, 27 U.S.P.Q.2d 1526 ; *Courtesy Temp.* , 222 Cal. App. 3d
4 1278.

5 **3. Pacific Has Violated The Telecommunications Act of**
6 **1996**

7 Pacific's misappropriation also violates the Telecommunications Act of 1996.
8 Pursuant to Section 222(a) of the 1996 Telecommunications Act ("1996 Act"), Pacific Bell has a
9 duty to "*protect the confidentiality of proprietary information of, and relating to, other*
10 *telecommunications carriers.*" 47 U.S.C. § 222(a). Pacific has breached that duty. As
11 discussed above, plaintiffs provide compiled proprietary information to Pacific Bell in the course
12 of Pacific Bell's rendering of bills. Section II.C. By using plaintiffs' proprietary information for
13 its own marketing purposes, Pacific has intentionally violated the statute.

14 Pacific has argued that plaintiffs' proprietary information is "Customer
15 Proprietary Network Information," or CPNI, under 47 U.S.C. § 222(c). Opp. TRO Brief at 8-9.
16 We assume it will renew that argument. However, that argument is a red herring and misreads
17 the plain language of the law. The information is not "CPNI." CPNI is information "that is made
18 available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47
19 U.S.C. § 222(f)(1)(A). Pacific is not the telecommunications carrier for plaintiffs' long distance
20 services -- plaintiffs are. Pacific receives plaintiffs' information about customers' usage of long
21 distance services by virtue of its provision of a billing and collection service, not "by virtue of its
22 provision of a telecommunications service," as required by Section 222(c)(1).

23 Pacific admits it is using plaintiffs' proprietary information for purposes other
24 than billing and collection services. Accordingly, it has violated its duty of confidentiality, and
25 plaintiffs succeed on this claim as well.
26

1 **4. Pacific Has Engaged In Unfair Competition Under**
2 **Federal And State Laws**

3 Plaintiffs will prevail on each of their claims for false advertising and unfair
4 competition under Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) and California
5 Business & Professions Code Sections 17200 and 17500. Under the Lanham Act, plaintiffs must
6 prove: (1) Pacific has made false or misleading representations; (2) "these representations
7 deceive or are likely to deceive a substantial segment of the intended audience" (actual or
8 potential customers of Pacific and plaintiffs); and (3) "the representations are material in that
9 they have caused injury, or are likely to do so." *Valu Engineering*, 732 F. Supp. at 1026
10 (granting preliminary injunction prohibiting defendant's false advertising); *see also U-Haul Int'l*,
11 522 F. Supp. 1238 (D. Ariz. 1981).¹¹

12 **a) Pacific's Advertisements Are False And**
13 **Misleading**

14 Advertisements need not be literally false to be actionable; true but misleading
15 advertisements are equally prohibited. *American Home Prods. Corp. v. Johnson & Johnson*, 577
16 F.2d 160 (2d Cir. 1978); *see also Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv.,*
17 *Inc.*, 911 F.2d 242, 245 (9th Cir. 1990). Similarly, a statement is actionable if it is partially
18 incorrect, or untrue as a result of failure to disclose a material fact. *U-Haul Int'l*, 522 F. Supp.

19 _____
20 ¹¹ Similarly, California Business and Professions Code section 17500 makes it unlawful to
21 disseminate any advertising statement "which is untrue or misleading, and which is known, or
22 which by the exercise of reasonable care should be known, to be untrue or misleading."
23 *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 210 (1983).
24 Section 17200 prohibits "any unlawful, unfair, or fraudulent business practice and unfair,
25 deceptive, untrue or misleading advertising." *Id.* at 210 n.8; Cal. Bus. & Prof. Code § 17200.
26 "Any violation of the false advertising law section 17500 . . . necessarily violates the unfair
competition law section 17200." *Id.* at 210 (footnote omitted). "Any person who engages, has
engaged, or proposes to engage in unfair competition may be enjoined in any court of competent
jurisdiction." Cal. Bus. & Prof. Code § 17203; *see also* Cal. Bus. & Prof. Code § 17535.

1 1238; *see Lamothe v. Atlantic Recording Corp.*, 847 F. 2d 1403, 1408 (9th Cir. 1988); *Boshsei*
2 *Enterprises Co. v. Porteous Fastener Corp.*, 441 F. Supp. 162 (C.D. Cal. 1977).

3 Pacific's advertisements for the awards program are both literally false and
4 misleading. First, Pacific's advertising and promotional materials falsely imply that plaintiffs
5 sponsor, approve, endorse or are affiliated with the disclosure of their proprietary information to
6 Pacific.¹² Section II.E.

7 Second, Pacific's advertising materials are false, deceptive and misleading in that
8 they solicit customers to sign inoperative releases. As explained above, customers cannot waive
9 plaintiffs' rights in the proprietary information they have compiled. Section II.C. Yet the ads
10 emphasize that *all charges*, including long distance, qualify for points in the program, and that
11 the customers need simply "sign here" to enroll. Section II.E. That is false because the only way
12 that *all charges* are included in the program is through Pacific Bell's use of plaintiffs' proprietary
13 information, which it cannot do under the Billing Agreements. Section II.C. Thus, the
14 customers' signature is *not* effective to earn credit for long distance charges in the program.

15 **b) The Public Is Likely To Be, and Has Been,**
16 **Deceived By Pacific's False And Misleading**
Advertisements

17 A showing of likely, as opposed to actual, public deception satisfies both the
18 Lanham Act and California unfair competition law, *Valu Engineering*, 732 F. Supp. at 1026;
19 *Children's Television*, 35 Cal. 3d at 211; *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 929
20 (1985), and "the court may grant relief without reference to the advertisement's impact on the
21 buying public." *Princeton Graphics v. NEC Home Electronics*, 732 F. Supp. 1258, 1265
22

23
24 ¹² Pacific's ads need not directly refer to plaintiffs to be actionable under the Lanham Act.
25 *See Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 946 (3rd Cir. 1993). Similarly, a statement is
26 actionable if it is partially incorrect, or untrue as a result of failure to disclose a material fact, i.e.,
that plaintiffs are not affiliated with the awards program. *U-haul*, 522 F. Supp. at 1238.

1 (S.D.N.Y. 1990); *see also PPX Enterprises v. Audio Fidelity Enterprises, Inc.*, 818 F.2d 266, 272
2 (2d Cir. 1987). Pacific's representations *are* plainly likely to deceive customers into believing
3 that 1) plaintiffs are affiliated with the awards program, and 2) customers can waive plaintiffs'
4 rights to plaintiffs' compiled proprietary information. One need look no further than the
5 advertisements themselves to see that they create confusion by falsely representing that the
6 customers may accrue credit by long distance charges simply by signing a release.

7 **c) Plaintiffs Have Been Injured by Pacific's False**
8 **Advertising**

9 Pacific's misleading advertisements place plaintiffs in a lose-lose position.
10 Through its ads, Pacific is promoting its loyalty marketing program in order to compete with
11 plaintiffs for customers. But as the release in its ads make clear, the competition is based upon
12 use of plaintiffs' proprietary long distance information, which Pacific has no right to use. The
13 misleading release is a key element in Pacific's misappropriation of plaintiffs' information; with
14 each release it receives, Pacific takes some more of plaintiffs' information, resulting in the harms
15 described above. Moreover, once Pacific is prevented from misappropriating plaintiffs'
16 information, and customers realize that the releases they signed were inoperative and they are not
17 awarded bonus points based on their long distance charges, customers are likely to blame
18 plaintiffs, since the ads falsely suggest that plaintiffs are affiliated with the awards program.
19 Plaintiffs' reputations and goodwill will be tarnished. *See Apple Computer*, 725 F.2d at 526;
20 *Trans Pacific*, 739 F. Supp. at 247. Thus, Pacific's misleading ads have already injured and will
21 injure plaintiffs.

22 **D. Balance of Hardships Tips For Plaintiffs**

23 The balance of hardships clearly favors plaintiffs. *Oakland Tribune Inc. v.*
24 *Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). As described in detail above, the harm
25 to plaintiffs is real and is happening now. The awards program is well underway, with bonus
26 points being awarded on an ongoing basis using plaintiffs' proprietary information. In essence,

1 Pacific is stealing plaintiffs' proprietary information and using it to launch, and maintain, a
2 massive customer loyalty program to compete right now with plaintiffs for customers. Once
3 taken, the information's value has been destroyed; plaintiffs no longer control the fruits of their
4 own investment. To avoid any further misappropriation, plaintiffs would terminate their
5 contracts with Pacific immediately if they could, but the enormous expense of finding
6 replacement bill rendering and collection service capacity while providing uninterrupted billing
7 services for each of their millions of customers makes it impossible to do so. Section II.C.

8 Pacific, by contrast, has no evidence of harm. Pacific cannot allege harm from
9 being prevented from using information it had no right to use in the first place. Moreover, unlike
10 plaintiffs, Pacific can easily avoid any injury it could allege will occur if the injunction is
11 granted. Pacific is not "locked in" to using and disclosing plaintiffs' proprietary information for
12 the awards program. Pacific controls the terms and conditions of the program, and it can change
13 those terms and conditions. For example, Pacific set the minimum level for awards at \$50. But
14 that threshold need not be \$50 or any set amount.¹³ There are many alternatives that are both
15 viable and lawful. Pacific could roll out its program based *solely* on charges resulting from the
16 services it offers. If it wanted to award points based on a customer's long distance charges,
17 Pacific could do so -- as long as it did not use plaintiffs' proprietary billing databases to do that.
18 Customers could send Pacific their bills directly, and Pacific could build its own database. These
19 options might be more expensive and less convenient, but they are the costs of doing business
20 fairly. Thus, the only "hardship" imposed by the injunction would be to force Pacific to acquire
21 competitive benefits like everyone else, by its own hard work and financial investment.

22
23
24 ¹³ As explained in Sections II.B. and III.B.1., the fact that Pacific set the threshold at \$50
25 reveals its intentions to use this information to gain, at no cost, a list of valuable long distance
26 customers. Average local service charges are only \$20-25. Therefore, a \$50 minimum can
hardly promote the use of local services.

1 IV. CONCLUSION

2 For the reasons stated above, plaintiffs respectfully request that the Court grant
3 plaintiffs' application for a preliminary injunction.

4 DATED: June 4, 1996.

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No. 96-16476
District Court No. CV-96-1691 SBA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AT&T COMMUNICATIONS OF CALIFORNIA, INC.,
MCI TELECOMMUNICATIONS CORPORATION,
SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiffs/Appellees,

v.

PACIFIC BELL, et al.,

Defendants/Appellants.

Appeal from Order Granting Preliminary Injunction
United States District Court for the Northern District of California
Honorable Sandra B. Armstrong, Presiding

JOINT BRIEF OF APPELLEES AT&T COMMUNICATIONS,
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not the program itself. The Carriers have never sought to prevent Pacific from having its marketing program, and the injunction specifically states that it is free to do so. Pacific simply cannot steal information for that program from the Carriers. The district court did not abuse its discretion. Its order must be upheld.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion or relied on an erroneous legal premise in finding that Pacific Bell breached its contracts with the Carriers when it used the Carriers' proprietary information for its own purposes.

2. Whether the district court abused its discretion or relied on an erroneous legal premise in finding that Pacific violated the Telecommunications Act of 1996 when it used the Carriers' proprietary information for its own purposes.

3. Whether the district court abused its discretion or relied on an erroneous legal premise in finding that Pacific misappropriated trade secrets when it used the Carriers' proprietary information for its own purposes.

4. Whether the district court abused its discretion in issuing a preliminary injunction where the Carriers showed a strong likelihood of success on the merits and a possibility of irreparable harm.²

III. STATEMENT OF THE CASE³

Rather than confront the relevant facts, Pacific has chosen instead to ignore and obscure them. This appeal concerns Pacific's design and implementation of a marketing program that has as its central feature the exploitation of the Long Distance Carriers' proprietary information. It is not, as Pacific asserts, about a customer's right to release information her telephone company has compiled about her. Although Pacific never mentions it in its opening brief, the relationship between each Carrier and Pacific Bell is purely contractual, and the contracts are sufficient to dispose of Pacific's assertions.

² Pacific purports to present a fourth issue for review: "Whether . . . the district court erred in finding that there was a risk that confidentiality of 'proprietary information' belonging to plaintiffs would be lost." Opening Br. at 3. That question is not addressed in Pacific's opening brief, so the Carriers cannot respond to it here. Pacific should not be permitted to raise this issue solely on reply. *Cmte. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 819 n.3 (9th Cir. 1996) (ordinarily any issue not raised in the opening brief is waived).

³ The Carriers agree with Pacific's Statement of Jurisdiction.

Moreover, Pacific's own admissions and interpretation of the agreements confirm that the district court's order granting the preliminary injunction was not an abuse of discretion.

A. The Billing Agreements With Pacific

Millions of customers in California receive one telephone bill for both their local and long distance charges. 5/7 Banco Decl., ¶ 13, ER 127; 5/7 Arnett Decl., ¶ 13, ER 77; Morrison Decl., ¶ 13, ER 197. This is made possible by the contract each Long Distance Carrier has with Pacific Bell for the provision of billing and collection services ("Billing Agreement"). Elizondo Decl., ¶ 6, ER 280; 5/7 Banco Decl., ¶ 14, ER 128; 5/7 Arnett Decl., ¶ 13, ER 77; 5/7 Morrison Decl., ¶ 14, ER 198; Order Granting Preliminary Injunction ("Ord."). at 2:23-3:13, ER 674-75. Pursuant to these Billing Agreements,⁴ each Carrier separately transmits, in a specially coded, electronic format, long distance billing and usage

⁴ Pacific has conceded that there is no substantive difference between the provisions in the AT&T, MCI and Sprint agreements with Pacific Bell. Ord. at 5, n. 3, ER 677; Transcript of Oral Argument ("Tr. Oral Arg."), at 47:25-48:1, ER 750-51.

information on its long distance customers to Pacific Bell.⁵ These written contracts then permit Pacific Bell to use the long distance information to render a single bill to telephone customers that includes both local and long distance telephone charges. 5/7 Banco Decl., ¶ 13, ER 127; 5/7 Arnett Decl., ¶ 13, ER 77; 5/7 Morrison Decl., ¶¶ 12-13, ER 197. Under the Billing Agreements, Pacific Bell is also obligated to collect the long distance portion of a customer's bill, and remit payment to the appropriate Carrier.⁶ Absent the Billing Agreements, Pacific Bell and its affiliates would have no access to any of Carriers' long distance customer information. 5/7 Banco Decl., ¶ 10, ER 127; 5/7 Arnett Decl., ¶ 10, ER 76; 5/7 Morrison Decl., ¶ 10, ER 197.

⁵ The Carriers electronically transmit the long distance customer usage and billing information to Pacific in "files, records, and data elements" which are "coded in a specified format." AT&T and MCI Complaint, ¶ 18, ER 5; Sprint Complaint ¶ 18, ER 146. The Carriers often refer to the electronic compilation of information they transmit to Pacific as their "proprietary billing databases."

⁶ Pacific's statement that "the TBR amounts are owed exclusively to Pacific Bell," Opening Brief ("Opening Br."), at 5, is misleading at best. Under the Billing Agreements, Pacific Bell is *required* to purchase the Carriers' accounts receivable in order to perform collection services, but each Carrier, not Pacific Bell, assumes full liability for the long distance portion of the total billed to the customer. 5/13 Mosley Decl., ¶¶ 3-4, ER 310; Friday Decl., ¶¶ 5-6, ER 340; Supplemental Morrison Decl., ¶ 4, ER 375.

The Long Distance Carriers have invested substantial resources in compiling and formatting the long distance usage and billing information transmitted to Pacific Bell pursuant to the Billing Agreements. 5/7 Banco Decl., ¶¶ 5-7, ER 125-26; 5/7 Arnett Decl., ¶¶ 5-7, ER 74-75; 5/7 Morrison Decl., ¶¶ 5-7, ER 195-96. This proprietary billing data on long distance customers, which is provided to Pacific Bell in an easily manipulable format, is not publicly available. The Carriers have implemented procedures to ensure that the information remains confidential. 5/7 Banco Decl., ¶¶ 9-10, 18-19, ER 126-27, 129; 5/7 Arnett Decl., ¶¶ 9-10, 18-19, ER 76, 79; 5/7 Morrison Decl., ¶¶ 9-10, 18-19, ER 196, 198-99. The information is restricted within the Carriers' own organizations. *Id.* The Carriers' compilation of proprietary information is valuable competitive information because it represents a detailed profile of the Carriers' long distance business, markets, products, pricing, revenues, network usage, and because it identifies long distance customers on the basis of volume and detail. 5/7 Banco Decl., ¶¶ 7-10, 18-19, ER 126-27, 129; 5/7 Arnett Decl., ¶¶ 7-10, 18-19, ER 74-75, 79; 5/7 Morrison Decl., ¶¶ 7-10, 18-19, ER 196-97, 198-99.

In recognition of the value of the Carriers' long distance information, and the Carriers' uneasiness in providing it to Pacific Bell, each Carrier and Pacific

Bell expressly agreed in the Billing Agreements about the manner in which the information would be treated. In unmistakable terms, both the information and the format in which it is transmitted to Pacific Bell have been designated as "proprietary." 5/7 Banco Decl., ¶ 18, ER 129; 5/7 Arnett Decl., ¶ 18, ER 79; 5/7 Morrison Decl., ¶ 18, and Ex. 1 (filed under seal) "Reciprocal Non-Disclosure Agreement," ER 198, CR(S) 6. Moreover, the long distance information is the subject of confidentiality provisions which restrict Pacific Bell's ability to use the information. For example, the AT&T/Pacific Bell Billing Agreement unambiguously provides that:

Proprietary Information described above shall . . . be held in confidence by the Receiving Party . . . shall not be disclosed to third persons but may be disclosed to contractors and agents who have a need for it . . . shall be used only for the purposes stated herein; and may be used or disclosed for other purposes only upon such terms and conditions as may be mutually agreed upon by the Parties in writing.

5/7 Banco Decl., Ex. 1 at 2, ER 137 (emphasis added).

The stated purposes of the Billing Agreements are Pacific Bell's billing and collection obligations to each Long Distance Carrier, and they certainly do not include marketing programs like the Pacific Bell Awards Program ("PB

Awards” or “Awards Program”). 5/13 Piccirilli Decl., ¶ 13, ER 316; 5/7 Bisazza Decl., ¶¶ 11(b), 12, ER 95-96. In fact, Pacific has never contended that the Awards Program is a permissible purpose or use of information transmitted pursuant to the Billing Agreements. Answer to AT&T/MCI Complaint, ¶¶ 39-40, ER 396; Answer to Sprint Complaint ¶¶ 38-39, ER 415; *see also* Ord. at 8:8-15, ER 680. Nor has Pacific explained how any of the defendants would have access to the Carriers’ proprietary information absent the Billing Agreements.

B. Pacific’s Admissions

The facts that give rise to the Carriers’ claims are undisputed. Pacific admits the following:

- Each Carrier regularly transmits long distance usage and billing data to Pacific Bell pursuant to the Billing Agreements, and this data is confidential and proprietary within the meaning of the Billing Agreements. Answer to AT&T/MCI Complaint, ¶¶ 14, 16, ER 391; Answer to Sprint Complaint, ¶¶ 14, 16, ER 411; Tr. Oral Arg. at 13:10-25, 14:22-25, 15:1-10, 16:20-25, 17:1-13, 23:16-21, ER 716-720, ER 726. For example, Pacific stated at the hearing for preliminary injunction that when the Carriers “send [long distance

billing information] over to [Pacific Bell] *it's clearly their information.*" Tr. Oral Arg. at 14:25, 15:1, ER 717-18 (emphasis added).⁷

• After receiving the Carriers' long distance billing information, Pacific Bell adds Pacific Bell local charges to the Carriers' proprietary long distance charges to get to a total it calls "total billed revenue" ("TBR"), or "lump sum." Elizondo Decl., ¶¶ 7-8, ER 281-82; Tr. Oral Arg. at 13:8-17, 14:24-25, 15:1-10, ER 716-18.⁸

⁷ See also Tr. Oral Arg. 23:16-21, ER 726:

The Court: Well.. I guess I'm not really completely understanding your position because you acknowledge in the answer and you acknowledge now that what you received from [the Carriers] is, in effect, from your perspective, confidential proprietary information.

Mr. Lawyer: Yes.

⁸ Despite Pacific's attempt to make the calculation of TBR appear complex, TBR is nothing more than the sum of two numbers: total monthly Pacific Bell charges and total monthly long distance charges.

- Pacific Bell transferred TBR (one component of which is the Carriers' proprietary long distance billing data) to PB Extras. Opposition to Motion for Preliminary Injunction at 4:25-27, ER 591.⁹
- PB Extras uses TBR to calculate bonus points for the PB Awards Program. Elizondo Decl., ¶¶ 7-8, ER 281-82; Tr. Oral Arg. at 13:8-17, 14:24-25, 15:1-10, ER 716-18.
- No Carrier has authorized the use of its proprietary information as part of the PB Awards Program. Answer to AT&T/MCI Complaint, ¶¶ 39-40, ER 396-97; Answer to Sprint Complaint, ¶¶ 38-39, ER 415; *see also* 5/7 Banco Decl., ¶ 20, ER 129; 5/7 5/7 Arnett Decl., ¶ 20, ER 79-80; 5/7 Morrison Decl., ¶ 20, ER 199.

As the district court correctly concluded, Pacific's direct admissions about the Billing Agreements and the Pacific Bell Awards Program are fatal to its defense.

⁹ Thus, Pacific's statement that "Pacific Bell *intended* to transfer TBR lump sum information on program enrollees to a Pacific Bell Extras computer database for calculation of customer Awards points," Opening Br. at 6-7 (emphasis added), is false. This transfer has already started.

C. The Pacific Bell Awards Program

Notwithstanding the obvious import of its admissions, Pacific designed a loyalty program based upon the unauthorized invasion of each Carrier's database. The Awards Program offers eligible customers bonus points for each dollar spent on their combined monthly local and long distance charges, on TBR. 5/7 Hewitt Decl., ¶¶ 6, 19, ER 287, 290; *see also* Ord. at 2:5-22, ER 674. The long distance portion of the TBR is extracted from the Carriers' proprietary billing databases. Elizondo Decl., ¶¶ 7-8, ER 281-82; Tr. Oral Arg. at 13:8-17, 14:24-25, 15:1-10, ER 716-18. In an attempt to justify that use, the Awards Program solicits customers to sign "releases" that purport to authorize Pacific Bell to transfer "any/all" customer information (including information from the Carrier's proprietary billing databases) to PB Extras. PB Extras is authorized to share this information with all Pacific affiliates (including PB Com, the Carriers' soon-to-be competitor). AT&T/MCI Complaint, Ex. 3, ER 40.

The Awards Program was designed to attract the Carriers' best customers, that is, those who spend more than \$25 per month on long distance.¹⁰ 5/7 Bisazza Decl., ¶ 6, ER 94; Mannella Decl., ¶ 15, ER 478; *see also* Ord. at 13:22-28, ER 685. By structuring its awards program this way, Pacific is compiling a complete and accurate target list of proven long distance customers. By contrast, no Carrier has access to what its competitors' customers spend on long distance. Each Carrier therefore invests substantial sums in market research designed to target and attract potential customers likely to spend at least \$25 per month on long distance. 5/13 Piccirilli Decl., ¶ 5, ER 313; Levine Decl., ¶¶ 7-9, ER 580-81. Through the Awards Program, PB Com, the Carriers' future competitor, is provided with this invaluable information for free.

¹⁰ The minimum Pacific set to participate in the program is a total monthly bill exceeding \$50. *See* Opening Br. at 5. Pacific has not contested that average local line charges (including services like call waiting, third party calling, etc.) are only between \$20 and \$25 per month. 5/7 Bisazza Decl., ¶ 6, ER 94; Mannella Decl., ¶ 15, ER 478; *see also* Ord. at 13:22-28, ER 685. Thus to be eligible for awards, most customers would have to spend at least \$25 each month on long distance.